It is thought unfortunate also for another reason, — one which is an objection to all cases in which the doctrine of *respondeat superior* is applied to a person in control of a servant employed by another. The employee's only direct duty of obedience is by virtue of his contract with his employer, and it would seem, therefore, that he owes that duty to his employer alone. It is difficult, consequently, to understand how he can be in fact the servant of a third person to whom he owes no direct duty;[5] yet, if the relation of master and servant be not established, it is admittedly impossible to apply the doctrine of *respondeat superior*. This difficulty seems, however, to have been overlooked in the decided cases.

EQUITABLE ASSIGNMENT OF CHOSES IN ACTION. — Few legal expressions seem more loosely defined and inexactly employed than the phrase "equitable assignment" in cases where parties are dealing with choses in action. This inaccurate use of the term is probably due to the fact that the word "equitable" indicates the nature of a remedy rather than the form of an assignment. Whenever a court of equity protects an assignee the assignment is equitable. It has been easy, then, to lay stress on the remedy rather than the transaction which gave rise to it, and the nature of that transaction is often quite overlooked by the courts. From the decisions it is not always easy to see just what sort of transaction equity will enforce as an assignment.

Some of the cases are plain. For example, where the consignor of goods directed the consignee to pay a portion of the proceeds of the sale to a creditor of the consignor, this creditor prevailed against the consignor's trustee in bankruptcy, though the last named by telegram countermanded the direction before it was received by the consignee. *Alexander* v. *Steinhardt, Walker & Co.*, [1903] 2 K. B. 208. This was a clear case of equitable assignment, if the court was justified in finding from the course of business that the creditor accepted in satisfaction of his debt a part of the consignor's claim. In that case the intention of the parties to assign that claim was clear, and it is the intention of the parties that equity in all these cases rightly attempts to enforce. Since the assignment here was of a part of the claim only, the creditor acquired no rights at all at law, not even a power of attorney. His only remedy was in equity.[1]

Not all the cases, however, are so simple. Where a contractor maintained a special fund for the payment of wages, and a bank other than the depositary advanced on checks drawn upon that fund money to be used in the payment of wages, the bank prevailed against the contractor's trustee in bankruptcy, though the checks had not been presented for payment. *Fortier* v. *Delgado & Co.*, 122 Fed. Rep. 604 (C. C. A., Fifth Circ.). The court said the *checks* were an equitable assignment. But checks on a general fund are never treated as assignments.[2] Yet in both cases the character of the checks, as checks, is the same. They are mere revocable orders on which the payee acquires before acceptance no rights against the drawee either at law or equity. But in this case, as in every other, the real question was to find the intent of the parties, for it is this which equity enforces. And the intention to assign could be found here,

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[5] See 12 Am. L. Rev. 69.

[1] Getchell *v.* Maney, 69 Me. 442.

[2] Hall *v.* Flanders, 83 Me. 242.

for the drawing and accepting a check on a specified fund, known by the payee to be in existence, would indicate an assignment of part of the drawer's claim.[3] Where one draws generally, on the other hand, the facts would hardly indicate such an assignment of claim; the payee relies, not on the existence of a fund, but on the credit of the drawer. In both cases the payee gets a revocable order. But in the first case the order is good evidence of an equitable assignment, and in the second case it is not such evidence. The court must find the intention of the parties to assign a claim from the circumstances of the transaction, as well where it is the drawing of a check as where it is the simple, unmistakable assignment of a debt. It is in the intention of the parties that the assignment lies.

In all these cases, of course, the equitable remedy will be allowed only where the remedy at law fails. Thus where a check is drawn on a special fund, the drawer, if solvent, could stop payment without interference by a court of equity, for the payee would still have his remedy on the instrument. But when the drawer is bankrupt that remedy is inadequate, and equity will therefore protect the payee.

DUTY OF CARE BETWEEN CONFEDERATES IN ILLEGALITY. — If a plaintiff must show an illegal transaction in proving his case, the courts generally will not allow him to recover. This broad principle, however, has several recognized limitations. It applies only to negligent injuries, for the plaintiff's illegal act is no bar to his recovery for intentional harm.[1] Negligent injuries, however, may be of two kinds. They may result from the negligence either of a stranger to the illegal transaction, or of a confederate in illegality. In the former case, generally speaking, if the illegal act is a mere condition, not a cause of the injury, the plaintiff is not barred.[2] In the latter case, the weight of authority seems to hold that the courts will not enforce any duty of care between confederates in illegality, independently of any question of causation.[3] This rule was strictly applied in a recent North Carolina case. An editor, travelling on a pass, was injured by the railroad's negligence. A statute made it criminal to issue such a pass, and imposed a fine upon all companies which did so. The court held that the editor, being a party to an illegal transaction, could not recover. *McNeill* v. *Durham & C. R. Co.*, 44 S. E. Rep. 34. This result of the rule seems unjust for two reasons. First, even admitting the rule to be sound, the parties in the present case are not equally culpable, and the decision protects the chief offender. On this point some courts hold that where the illegality of the transaction is statutory, and the penalty imposed only on one party, the other is not *in pari delicto*, and is not barred.[4] That is the case here, and such a limitation seems more just than the general rule followed by the court. Second, the rule itself is open to objection. It seems unfair that a defendant should always escape liability

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[3] See Ketchum *v.* St. Louis, 101 U. S. 306.

[1] Welch *v.* Wesson, 6 Gray (Mass.) 505.

[2] Sutton *v.* Wauwatosa, 29 Wis. 21.

[3] Hegarty *v.* Shine, L. R. 4 Irish 288; Gilmore *v.* Fuller, 198 Ill. 130. But *contra*, Gross *v.* Miller, 93 Ia. 72.

[4] Tracy *v.* Talmadge, 14 N. Y. 162, and cases cited. Atlas Bank *v.* Nahant Bank, 44 Mass. 581, at p. 587.